

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §342.1 and §342.25.

Background and Summary of the Factual Basis for the Proposed Rules

House Bill (HB) 2582, 85th Texas Legislature (2017), amended the Texas Water Code (TWC), §28A.001(1) to add a new exemption to the list of existing exemptions in the definition of "Aggregate production operation" (APO). The exemption applies to a site at which specialty or terrazzo-type stone is removed or extracted from the earth, the material is produced for commercial sale and used exclusively for decorative or artistic uses, and the stone horizon that is exposed for current production does not exceed five acres.

The proposed rulemaking amends Chapter 342 to add the new exemption in HB 2582 and to amend rule language for consistency with TWC, Chapter 28A.

Section by Section Discussion

§342.1, Definitions

The commission proposes to amend §342.1(1)(E) for consistency with §342.1(1)(A) and (D) and TWC, §28A.001(1)(A) and (D) relating to "removed or extracted." The commission proposes §342.1(1)(F) to include the new exemption added by HB 2582.

The commission proposes to remove §342.1(6), which is the definition of "Regulated Activity," as this term is not used in the proposed rulemaking. The commission proposes to

add definitions for "Decorative or artistic uses," "Extraction activities," "Specialty stone," and "Terrazzo-type stone," to improve understanding and enforceability. Lastly, the commission proposes to re-number the definitions accordingly.

The commission interprets the phrase "the portion of the specialty or terrazzo-type stone horizon that is exposed for current production" from HB 2582 to mean the area exposed for current production, as viewed from an aerial perspective. While the commission is seeking comment on the entire rule, the commission is specifically requesting comment on this interpretation.

§342.25, Registration

The commission proposes to amend §342.25(a) to clarify that the requirement to register each operation refers to each APO. The commission proposes to amend §342.25(b) and (d) to replace "regulated activities" with "extraction activities" for consistency with TWC, §28A.051(a) and to replace "operation(s)" with "aggregate production operation," which is a site, or "extraction activities," which are activities at a site, to improve clarity. The commission proposes to amend §342.25(e) to remove the 30-day deadline for notifying the commission that extraction activities have ceased, as this deadline is not required by TWC, §28A.051(b). Additionally, the commission proposes language in §342.25(e) that allows the responsible party to inactivate their existing registration by allowing it to expire rather than submitting a cancellation form. This alternative option reduces the regulatory burden while achieving the same goal.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The rulemaking is proposed to implement HB 2582 which relates to an exemption for certain quarries from regulation as APOs. The legislation adds a new exemption from regulation for sites that do not exceed five acres where terrazzo-type stone is removed or extracted from the earth for decorative or artistic uses. Sites that meet the exemption criteria will no longer be required to register as an APO or pay the registration fee, but will still be subject to other air, water, and waste regulations and permitting.

The registration fees for sites less than 10 acres range from \$225 to \$300. Currently, the commission regulates 82 APOs that are five acres or less; however, based on the data in its system, the commission cannot determine how many of these fit the new exemption criteria. The commission's records do not capture the specific aggregate type, or the end uses. In the unlikely circumstance that each of these sites were to qualify for this exemption, the fiscal impact to the commission would be a decrease in revenue to the Water Resource Management Account Number 153 between \$18,450 and \$24,600 per year. The proposed rulemaking also contains non-substantive changes for consistency with other sections of the

TWC.

Public Benefits and Costs

Ms. Bearse has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the proposed rulemaking will be compliance with state law and consistency with other sections of the TWC.

The proposed rulemaking is expected to save owners of newly exempted entities between \$225 and \$300 per year in annual registration fees. The proposed rulemaking creates an exemption to registration for APOs that extract a specialty or terrazzo-type stone for decorative or artistic uses on a site that does not exceed five acres.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Communities Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The proposed rules would apply statewide and have the same effect in rural communities as in urban communities.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rules do not require the creation of new employee positions nor eliminate current employee positions. The proposed rules will result in a decrease in fees paid to the commission. Because the proposed rulemaking contains an exemption to regulation, it does limit an existing regulation and decreases the number of individuals subject to its applicability. During the first five years, the proposed rules should not impact

positively or negatively the state's economy.

Draft Regulatory Impact Analysis

The commission reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "Major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "Major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "Major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The legislature enacted HB 2582, amending TWC, §28A.001(1), which relates to APOs. As the Author's/Sponsor's Statement of Intent makes clear, the legislature enacted HB 2582 with

the aim of exempting certain quarries from current law that stipulates that certain APOs in Texas must adhere to regulations set by the commission, and while there are exemptions in place for some quarries from APO regulations, there is currently no consideration given to a small or micro-business status of their operator. HB 2582 addressed this issue by providing for an exemption for certain quarries from regulation as an APO by adding them to the list of quarries exempted from TCEQ's APO regulations. HB 2582 amends the TWC to exclude from the definition of "Aggregate production operation" operations at a site where the materials being removed or extracted are specialty or terrazzo-type stone removed or extracted exclusively for decorative or artistic uses and where the specialty or terrazzo-type stone horizon that is exposed for current production for commercial sale at the site does not exceed five acres. HB 2582 amends current law relating to an exemption for certain quarries from regulation as APOs. Therefore, the specific intent of the proposed rulemaking is to add a new exemption to the list of existing exemptions in the definition of an APO.

The proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Therefore, the proposed rulemaking does not fit the Texas Government Code, §2001.0225 definition of "Major environmental rule."

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full

Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates an exemption within state law to ensure that small businesses are protected by state law. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not proposed under the TCEQ's general rulemaking authority. This rulemaking is proposed under specific state statutes enacted in HB 2582. Because this proposal does not constitute a "Major environmental rule," a Regulatory Impact Analysis is not required.

The commission invites public comment on the Draft Regulatory Impact Analysis. Written comments may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis.

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I of the Texas Constitution; or a governmental action that affects an

owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The specific purpose of the proposed rulemaking is to implement the legislative amendments in HB 2582, which modifies the definition of an "Aggregate production operation" by creating an additional exemption to the list of existing exemptions in the definition of "Aggregate production operation." The proposed rulemaking will substantially advance this stated purpose by proposing §342.1(1)(F) to include the new exemption from HB 2582 and amending rule language for consistency with TWC, Chapter 28A while reducing regulatory burden.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the proposed rulemaking does not apply to or affect any

landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rules are administrative and do not impose any new regulatory requirements. The primary purpose of the proposed rulemaking is to implement HB 2582 by modifying the definition of an "Aggregate production operation" to include the new exemption and amend language for consistency with TWC, Chapter 28A. The proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas and to ensure sound management of all coastal resources by allowing for compatible

economic development and multiple human uses of the coastal zone.

The proposed rules are consistent with the CMP goals and policies because the proposed rulemaking does not authorize the storage, emission, or discharge of any pollutant. The proposed rules exempt certain APOs from the registration and annual fees in Chapter 342. The registrations, required by Chapter 342, do not authorize the storage, emission, or discharge of any pollutant.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 22, 2019, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however,

commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

<https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2017-026-342-OW. The comment period closes on January 30, 2019. Copies of the proposed rulemaking can be obtained from the commission's website at

https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Laurie Fleet, TCEQ Wastewater Permitting Section, (512) 239-5445.

SUBCHAPTER A: GENERAL PROVISIONS

§342.1

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state. TWC, §28A.001 defines "Aggregate production operation" and lists the operations excluded from this definition.

The amendment implements House Bill 2582, 85th Texas Legislature (2017) and TWC, §§5.013, 5.102, 5.103, and 5.120.

§342.1. Definitions.

The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Aggregate production operation--A site from which aggregates are being or have been removed or extracted from the earth, including the entire areas of extraction, stripped areas, haulage ramps, and the land on which the plant processing the raw materials is located, exclusive of any land owned or leased by the responsible party not being currently used in the production of aggregates. For the purposes of this chapter, the term aggregate production operation does not include:

(A) a site at which aggregates that are being removed or extracted from the earth are used or processed at the same site or at a related site under the control of the same responsible party for the primary purpose of production of cement or lightweight aggregates, or in a lime kiln;

(B) a site that is being used solely to provide aggregate products for use in a public works project involving the Texas Department of Transportation, any other state agency, or a local governmental entity;

(C) an extraction area from which all raw material is extracted for use as fill or for other construction uses at the same or a contiguous site;

(D) a site at which the aggregates that are being removed or extracted from the earth are used or processed for use in the construction, modification, or expansion of a solid waste facility at the site or another location; [or]

(E) a site at which aggregates are being removed or[,] extracted[, or processed] where the primary purpose of removal or[,] extraction[, or processing] is not for commercial sale; or[,]

(F) a site at which:

(i) the materials being removed or extracted from the earth are specialty stone or terrazzo-type stone removed or extracted exclusively for decorative or artistic uses; and

(ii) the portion of the specialty or terrazzo-type stone horizon that is exposed for current production for commercial sale does not exceed five acres. This portion is defined as the area exposed for current production, as viewed from an aerial perspective.

(2) Aggregates--Any commonly recognized construction material originating from an aggregate production operation from which an operator extracts dimension stone, crushed and broken limestone, crushed and broken granite, crushed and broken stone not elsewhere classified, construction sand and gravel, industrial sand, dirt, soil, or caliche. For purposes of this chapter, the term aggregates does not include clay or shale mined for use in manufacturing structural clay products.

(3) Commission--The Texas Commission on Environmental Quality.

(4) Decorative or artistic uses--Uses for ornamentation or creating artwork.

This does not include uses such as construction activities, structural concrete, road construction, building facades, or mass-produced items.

(5) Extraction activities--The act of removing or extracting aggregates from the earth.

(6) [(4)] Operator--Any person engaged in and responsible for the physical operation and control of the extraction of aggregates.

(7) [(5)] Owner--Any person having title, wholly or partly, to the land on which an aggregate production operation exists or has existed.

[(6) Regulated Activity--Any activity that is regulated by the Texas Commission on Environmental Quality.]

(8) [(7)] Responsible party--The operator, lessor, or owner who is responsible for the overall function and operation of an aggregate production operation.

(9) [(8)] Site--One [one] or more contiguous or adjacent properties under common control by the same responsible party.

(10) Specialty stone--Stone that occurs in limited quantity, that is extracted for its unique and naturally occurring color, texture, opacity, or luster, and shall not include attributes commonly found in aggregates.

(11) Terrazzo-type stone--Stone that is incorporated into mortar or other similar wet binding agent used to create mosaic designs, images, pictures, or patterns.

SUBCHAPTER B: REGISTRATION AND FEES

§342.25

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013 which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state.

The amendment implements House Bill 2582, 85th Texas Legislature (2017) and TWC, §§5.013, 5.102, 5.103, and 5.120.

§342.25. Registration.

(a) The responsible party for an aggregate production operation, in operation on or before September 1, 2012, shall register each aggregate production operation with the commission within the 60-day period beginning September 1, 2012.

(b) The responsible party for an aggregate production operation that begins extraction activities [operations] after September 1, 2012 shall register each aggregate production operation with the commission not later than the 10th business day before the beginning date of extraction [regulated] activities.

(c) An aggregate processing plant that has the same responsible party and is located at the same site from which aggregates are being or have been removed or extracted from the earth is not required to obtain a separate registration.

(d) The responsible party for an aggregate production operation shall renew the registration annually as extraction [regulated] activities continue.

(e) The requirements of this chapter are not applicable to aggregate production operations where:

(1) extraction activities have ceased; and

(2) the responsible party has submitted a registration cancellation request to the commission or allowed the existing registration to expire.

[(e) Within 30 days after all regulated activities at an aggregate production operation have ceased, the responsible party shall submit a registration cancellation request to the commission.]

(f) Applications for registration or cancellation of a registration shall be made on forms prescribed by the executive director.